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Getting into the Act

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GETTING INTO THE ACT

Stephen T. Maher

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GETTING INTO THE ACT

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I. INTRODUCTION

The Florida Administrative Procedure Act is now twenty years old.¹ The *Florida State University Law Review* celebrated the APA's fifteenth anniversary with a symposium that examined the Act's origins, evaluated the Act's success in establishing a balanced procedural framework for developing agency policy and resolving administrative disputes, and debated changes that might improve the Act.² On the Act's twentieth anniversary, the mood is not so celebratory. In the most recent legislative session, the Act received an unprec-

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1. The Florida Administrative Procedure Act is found at chapter 120, *Florida Statutes*. This Article will refer to the Administrative Procedure Act both as the APA and the Act.

2. The Symposium may be found at 18 FLA. ST. U. L. REV. 607 (1991).

edented barrage of criticism. Many proposed amendments to the Act were advanced and outright repeal was suggested.

The most surprising aspect of the 1994 session was not that attacks were made on the APA, but that the Act escaped those attacks unscathed. Many APA related bills were filed. Both the Senate and House had select committees working on APA reform. The assumption before the session, when the House Select Committee on Agency Rules was holding workshops and soliciting suggestions for amendments to the Act, was that changes were inevitable. The only question was which changes would be approved.

Why did the APA come under such strong attack? Are major changes in Florida administrative procedure really needed? If so, what changes should be made? There are many different views on these important issues advanced in this Symposium. In this article, I will present my views.

II. WHY ALL THE EXCITEMENT?

Why did such a large number of legislative proposals to amend the APA emerge during the 1994 session? The immediate reaction might be that all this activity proves something must be very wrong with the present APA. I take a different view. I do not believe there is a crisis in administrative procedure in this state today.

There is always room for improvement in any procedural system. I could suggest, and indeed have suggested, changes that I believe could improve the Act.³ But, I do not find anything fundamentally wrong with the APA in its current form. All the clamor for amendment in 1994 has done little to clarify what changes should be made to improve the Act. If anything, it has confused the issue. So many off-the-cuff proposals were advanced that people are hesitant to suggest even well-thought-out changes. The Legislature should wait to amend the Act until after this clamor subsides.

If the Act is not fundamentally flawed, what is the source of the clamor? The answer is that there is more than one source. As David Gluckman argues,⁴ some of the support for changing the APA comes from opponents of growth management.⁵ Their attention has focused on procedure now that property rights advocates and growth manage-

3. See, e.g., Stephen T. Maher, *We're No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U. L. REV. 767 (1991).

4. David Gluckman, *1994 APA Legislation: The History, The Reasons, The Results*, 22 FLA. ST. U. L. REV. 349, 354 (1994).

5. For a comprehensive discussion of growth management in Florida, see David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 226 (1993).

ment opponents have failed to bring growth management law closer to their respective legal positions. Also, growth management has brought people, formerly unfamiliar with the state bureaucracy and the APA, into close contact with both. For many property owners and local governments, the experience has not been pleasant. This has redirected some of the anger over growth management from the Legislature, which established the present growth management regime by statute,⁶ to the state bureaucracy that enforces growth management law. This change has brought focus on the APA, the statute that some feel should, and if amended could, do much more to protect them from the state bureaucracy.

Another reason that there were so many proposals to change the APA this year was that, at some point, it seemed that the Act was "in play." In a business context, a company may find itself "in play" when it puts itself up for sale or becomes a target for acquisition. When a company is "in play," a parade of suitors, bidders and speculators may suddenly arrive at its door. Some have never heard of the company before. Some may be unsure about what the company does. All believe that an opportunity is at hand and none wants to be left out because something is going to happen that will profit those who are well-positioned.

In 1994, the APA was "in play." When it appeared that major changes were imminent, people began lining up to take advantage of that opportunity. No one wanted to be left out. Lobbyists who envisioned helping themselves or their clients would have been foolish to ignore this golden opportunity. Even legislative staff tried to conform the Act to their vision of how the APA should operate.

While some who understand the Act tried to benefit from this opportunity, it was clear from the beginning that understanding the APA was not a requirement for proposing changes to it. Not only were many advocates of change unburdened by any knowledge of or experience with the Act, many seemed inclined to use the legislator's sharpest tool—passing amendments to the Act—when some duller instrument, such as legislative oversight, could better address their concerns.

III. WHAT IS THE PROBLEM?

In a single sentence, the various problems that some see with the Act today are that the bureaucracy is out of control, especially in the area of rulemaking, and the APA is not strong enough, or is not

6. See ch. 85-55, 1985 Fla. Laws 207 (creating The Growth Management Act of 1985).

cheap enough to use, or is not simple enough to use, to be as available as it should be to stop this runaway bureaucratic train. How should the Legislature respond to concerns like this? First, it should confirm whether these problems really exist. Second, assuming it can determine that problems exist, the Legislature should determine whether to get involved in solving these problems, or whether to allow affected individuals, with the aid of the courts or the executive branch, to deal with these problems themselves. Third, if it decides to get involved, the Legislature should take stock of its options before deciding what to do. The best solution may not be to amend the APA. If a bill is needed, it must be carefully crafted. The APA is not just a statute, it is the legislative description of a working system, the only system available to resolve agency disputes and create agency policy. Careless changes to that system may have unintended and unwelcome effects on agency policy and action.

A. *Proving the Problem*

First, has the Legislature confirmed that a problem exists? Anyone familiar with the history of the Florida APA, especially on the topic of protecting legislative prerogatives from agency encroachment, will approach with some skepticism the complaint that the bureaucracy is on a rampage of rulemaking in excess of delegated authority. I have noted elsewhere⁷ that the concern that agencies are usurping legislative lawmaking prerogatives is surprising because the Act contains such stringent protections against encroachment. These protections include the unique Florida rule challenge remedy, designed by Senator Dempsey Barron, a legendary force in the Legislature who was quick to protect legislative power.⁸ His concerns about what he called "phantom government"—government by a bureaucracy bent on enacting as rules legislative proposals that were rejected in the prior session—led to his inclusion of sections providing formal procedures for substantially affected parties to challenge rules in the Florida APA as originally adopted.⁹ These powerful remedies are still available today.

Over the past few years, legislators have returned to the theme that agencies are out of control in rulemaking.¹⁰ Some of that concern has

7. Stephen T. Maher, *Administrative Procedure Act Amendments: The 1991 and 1992 Amendments to the Florida Administrative Procedure Act*, 20 FLA. ST. U. L. REV. 367, 438 (1992).

8. Dem., Panama City, 1957-1988.

9. FLA. STAT. § 120.54(4) (1993) (authorizing challenges to proposed rules); § 120.56, (authorizing challenges to existing rules).

10. I noted this dynamic in the 1992 session, and it was evident in the 1994 session as well. See Maher, *supra* note 7.

resulted from a misunderstanding of how the process works. For example, legislators who measure administrative failure by the growing thickness of rulebooks may be reading the popular press,¹¹ but they have ignored the fact that the Legislature itself, through the 1991 amendments to the APA, mandated the adoption of agency policy by rule and thus created this increase in rulebook size.¹² In addition, the 1991 amendments were not a mistake. They were widely hailed as an improvement to the system because they made it likely that constituents would find policy in a rule book, not discover it for the first time when it was applied to them in an agency proceeding.¹³

In 1994, legislators clearly had the bureaucracy, and their perceived inability to control it, on their minds. Many proposals were advanced as "solutions," but the problems these proposals addressed were sometimes less than clear. During the 1994 Regular Session, many people favored "APA reform." The phrase "APA reform" itself suggests that something important is wrong with the APA and needs to be changed. If true, this is serious. The APA is the basic document that structures administrative decision making in Florida. It specifies the procedures that state agencies must follow when they make decisions, and provides procedural protections for those whose substantial interests are affected by these decisions. Significant changes to the APA would have far-reaching effects on state government and on the millions it regulates.

For many legislators, the need for "reform" was not a matter of proof. It was an article of faith. For some, it was a matter of political faith. Some legislators seemed to believe in the continued political viability of the 1980's theme: let's get government off the backs of people. Those in this camp felt a great distrust for all bureaucracy and, for them rulemaking reform could be summed up in the phrase "no rules are good rules." For others, the call for reform was an opportunity to press for procedural advantages or self-serving benefits. For some, the commotion provided a good opportunity to suggest radical changes. No proposal was too radical, not even a call for repeal of the APA. At some point, reform became a matter of political necessity. So much had been invested by those seeking reform, that some reform, any reform, was necessary to save face and justify expenditures.

11. See, e.g., *The Red Tape Tax*, FLA. TREND, Aug. 1993 at 31, 32-33 (noting that the Florida Administrative Code is growing at a rate of about a thousand pages a year and the Legislature at best barely influences the bureaucracy generating this mass of regulation).

12. Ch. 91-30, 1991 Fla. Laws 241; ch. 91-191, 1991 Fla. Laws 1604 (codified at FLA. STAT. § 120.535 (1993)).

13. See Maher, *supra* note 7.

For those who sought proof of the need for reform, select committees in both chambers held hearings that showcased examples of agency abuse. Constituents told of bureaucrats running amok, denying permits, adopting rules beyond legislative authority, and taking other actions that had done them wrong. The committees responded sympathetically. Cross-examination became a lost art. Bureaucrats were summoned. Heads were bowed. The "riot act" was read. Apologies were delivered.

Despite this showing, the assumption that something was fundamentally wrong with the administrative process in Florida escaped proof. It appeared quite clear from the committee testimony that the people who testified had been wronged, if at all, by bad bureaucrats, not by bad administrative procedures. Thus, from the testimony, it appeared that if the Act was guilty of anything, it was guilty of failing to stop bad bureaucrats cheaply and easily. This is clearly a tough job for any piece of paper. These hearings were a forum for constituents to vent their anger—not to find out whether, and to what extent, the bureaucracy was out of control. Agency witnesses recognized this and did not even try to mount a defense. For most of the session, the Governor's office was conspicuously absent from these proceedings.¹⁴

B. Whether to Get Involved

Even if the Legislature is unhappy with the degree of protection that the APA provides constituents, this is not necessarily a reason to amend the APA. Before amending the APA, the Legislature should consider both whether to get involved and how to get involved.

People have always had problems with government agencies and they always will. That is why we have laws and lawyers. That is also why legislators have traditionally had a role helping constituents who have problems with government agencies. The traditional response of legislators helping constituents has not been to propose new legislation. It has been to provide help on an individual basis through aides doing constituent service, and through legislators contacting agencies

14. I strongly dispute Sally Bond Mann's suggestion that the executive branch "successfully resisted reformation of the Administrative Procedure Act." Sally Bond Mann, *Legislative Reform of the Administrative Procedure Act: A Tale of Two Committees*, FLA. B. J. July/Aug. 1994, at 57, 60. I was surprised by the lack of resistance by the executive branch to the forces of "reform." There was virtually no public response by the executive branch to charges made against agencies during public hearings, and there certainly was much to say. Rather than anger legislators bent on reform by responding to constituent complaints, the Governor's office decided to cut a deal with the House early in the session to adopt significant changes to the Act. That deal was embodied in the version of HR 237 that emerged from the House Select Committee. Fortunately, it did not pass.

on the constituent's behalf. Constituent complaints have not been, and should not now become, the basis for setting the legislative agenda. Constituent problems should rarely be solved by general law because such legislation affects everybody, and everybody rarely shares the particular constituent problem motivating the legislation.

Amending the APA should be a last resort, not a standard response to constituent complaints. There are dangers inherent in using legislation—especially legislation drafted by people unfamiliar with administrative procedure—to try to address concerns about the effectiveness and workability of the APA. There are reasons the Legislature does not fiddle with the Evidence Code,¹⁵ and that the Supreme Court uses a variety of committees to provide advice on how to revise court rules. Changing a system of rules is tricky business. The first problem is that a system reflects a balance of underlying values, and that balance changes as the system changes. Second, there are dangers and difficulties in using procedural rules to create substantive advantages for constituents. Third, there are costs associated with the procedural rules governing the bureaucracy that have gone almost unnoticed during the debate. Fourth, there are better ways to revise the APA than by declaring “open season” on the Act during the legislative session.

1. *The Balance*

“Reformers” have shown little respect for the procedural system that has worked well to protect their constituents against abuses of agency power for the past twenty years. They also have seemed to forget that when it was adopted, the Florida APA was truly a reform.¹⁶ Creating and maintaining a good procedural system is no easy feat. All procedural systems require compromises between important underlying, competing values. All reflect a balance among those values.

An administrative procedure act must balance efficiency, accuracy and acceptability.¹⁷ These values pull against one another. Insistence on accuracy may make a system less efficient as hearings increase the cost and delay the process to provide more assurance that a correct result is reached. Insistence on efficiency may make it less possible to assure accuracy as procedural safeguards are abandoned to reduce costs and speed up the process. The balance struck among competing

15. FLA. STAT. §§ 90.101-.958 (1993).

16. See Symposium, *The New Florida Administrative Procedure Act: Selected Presentations from the Attorney General's Conference*, 3 FLA. ST. U. L. REV. 64 (1975).

17. Roger Crampton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Sitings*, 58 VA. L. REV. 585, 592-93 (1972).

values must not only be acceptable, it must be workable over time. Our APA has given a high value to accuracy and acceptability and a relatively low value to efficiency. This choice is evident in the "varied and abundant remedies"¹⁸ provided by the Act in general and in the availability of the rule challenge remedy in particular. Legislators proposing amendments "willy nilly" do not seem to understand that if their proposals are adopted, they may do more than change the law, they may change the fundamental balance of the Act in ways that may be neither wise nor sustainable over time.

a. The Simplifiers

Some reformers have sought a more simple Act. They cringe when they hear about some of the procedural complexities of the APA. They ask how an ordinary person could possibly succeed in pursuing the APA's "varied and abundant remedies," or could afford to pay counsel to assist them in doing so.¹⁹ It is a fact that some of the Act's strongest remedies can become complex and costly, especially when vigorously contested. It is also true that the Act empowers, and relies to a great degree, on substantially interested individuals to stop agencies who are abusing power.

This has both a positive and a negative side. On the positive side, the Act places extraordinary power to fight agencies in the hands of substantially affected persons—power unavailable outside Florida, and power that often has been used to shape agency policy in ways that more accurately reflect the concerns of those who use the remedies the Act provides.²⁰ On the negative side, the APA often saddles those who take action to protect themselves with the cost of that undertaking. Attorneys fees are awarded to those who use the Act's remedies in only limited circumstances. Thus, the APA is not without complexity and cost.

18. *Department of Gen. Services v. Willis*, 344 So. 2d 580, 590 (Fla. 1st DCA 1977).

19. An example of proposed legislation motivated by such concerns can be found in section 12 of the version of House Bill 237 that died at the end of the 1994 Extended Session. That section called for legislative review of the APA by Oct. 1, 1996,

to consider changes to that chapter based upon the following factors: (1) An administrative process that is not overly complex or burdensome; (2) An administrative process that provides easy access to the process for parties affected by agency action; (3) An administrative process that is not costly to participate in; (4) An administrative process that gives equal consideration to the position of the affected party and the agency.

Of course, the same bill also contained a number of new requirements that would further complicate the administrative process.

20. See *infra* note 23 and accompanying text.

When reformers argue for simplification of the Act and against this complexity and cost, they threaten the power that complexity creates, whether they recognize it or not. That is the reason people are hesitant to support simplification. A "lite" version of the APA, one that can be used without counsel or expense by any regulated person, would be easier to use, but would not protect people from an out-of-control bureaucracy as well as the present Act.

Special interests understand the connection between procedural complexity and substantive power in the administrative process. When they want to turn the process to their advantage what do they propose? They propose the addition of further complexities. That is exactly what happened this year. How can procedural complexities create substantive power?²¹ Consider the following, common example.

Agencies that implement legislative mandates sometimes have difficulty complying with procedural complexities while adopting rules. The more complex the rulemaking procedure, the more likely it is that agencies will make mistakes. Someone who wants changes made to a proposed rule can suggest changes, but the agency may generally ignore those suggestions if the matters are within agency discretion. However, if a person who wants changes made can identify the procedural mistakes made by the agency during rulemaking and file a challenge to the proposed rule on the basis of those mistakes, that challenge may provide the leverage necessary to persuade the agency to change the proposed rule in a way acceptable to the challenger.

This is how that commonly occurs. On paper, a challenge to the proposed rule is filed seeking to use the agency's mistakes to require the agency to begin the rulemaking process again. This could delay the adoption of the rules and could create an opportunity for other challengers to enter the proceedings. In fact, the challenger often just wants the agency to make small changes to the proposed rule, sometimes changes that are very important to the challenger but of little importance to the agency. On these facts, it is easy to see why agencies often compromise by making small changes in the proposed rule in return for dropping the challenge. But for the procedural complexities that were identified and properly raised by the challenger, no substantive concession would have been made. This is one way that procedural complexities can translate into substantive power.

Those who call for simplification are saying, in effect, that they are willing to give up the power that complexity creates. For them, effi-

21. It is the type of complexity, not the amount of complexity, that matters where the creation of power by complexity is concerned. An example of how the Florida APA can create power for affected persons through its procedural complexity follows.

ciency is more important than accuracy. While some may now feel this way, this is a different balance than the Act has traditionally struck among these competing values. The Florida APA has permitted significant potential inefficiency as a matter of policy choice, for example, by permitting trial-type challenges during rulemaking. That history, the chorus of cries for even more complexity in the APA that were heard during the session, and the Legislature's refusal to repeal complexities such as the rule challenge in prior years, even at the Governor's urging,²² all suggest that too much simplification may not be an acceptable alternative.

The trend of legislative concern has been to provide for more, not less, protection of constituents from the bureaucracy.

b. The Complicators

Some have advocated the addition of more complexities in rulemaking. The system that would emerge from such reforms would make rulemaking significantly more difficult for the agencies that conduct it. Thus, those who advocate more complexity advocate an even less efficient bureaucracy. The complicators should keep in mind that the Florida APA already provides the strongest arsenal of defenses against agency encroachment on an individual's substantial interests of any APA in the United States, especially in connection with rulemaking.²³ For this reason, the Florida APA can be one of the least efficient APAs. The argument that further complexities are essential to protect us from our administrative government leads to the question, if we have the strongest rulemaking remedies of any state, and those remedies are sorely inadequate, how have other states managed to survive?

The development of more complex rulemaking process would have an especially great impact on agencies today because, in 1991, amendments to the APA required agencies to adopt their policies as rules and provided an additional administrative remedy for agencies who fail to comply.²⁴ Those amendments have had the effect of substan-

22. For a discussion of the Governor's agenda for change in prior years, see Maher, *supra* note 7, at 408-18. Professor Dore was concerned that reform proposals designed to enhance efficiency do not unacceptably abridge citizen participation. Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U. L. REV. 437, 454-55 (1991).

23. Patricia A. Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 FLA. ST. U. L. REV. 703, 725 (1991); Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U. L. REV. 967, 1012 (1986); Maher, *supra* note 7, at 368.

24. Maher, *supra* note 7, at 390-408.

tially increasing rulemaking activity.²⁵ Making it more difficult and more expensive for agencies to carry out their newly expanded rule-making responsibilities will further reduce agency efficiency.

Efficiency is a core value in the design of any administrative process. If efficiency is discounted, at some point the system itself will cease to function. While some degree of inefficiency may be important to encourage correct and acceptable decisions, making it harder for agencies to hurt people also makes it harder for agencies to help people. Some of the discussion during the 1994 Regular Session seemed to assume that the less that agencies can do, the better for all of us. This approach is inconsistent with the present level of society's reliance on the administrative state. Like it or not, government plays a central role in our lives and it acts largely through the bureaucracy. At some point, complexities can cease becoming guarantees of accuracy and, instead, can become roadblocks to effective government. The challenge we face is to maintain tight enough control over government agencies to assure that they follow the direction set by elected policymakers without making them too inefficient to carry the heavy burden of responsibility they are delegated. That is, of course, the Rubik's Cube of administrative government. The difficulty of striking this balance does not justify ignoring it when devising amendments to the Act.

2. Dangers and Difficulties

Legislators are comfortable helping constituents and contributors by shaping substantive law to their benefit. However, our APA wisely embraces the concept of uniform procedures that apply across varying substantive contexts. For example, the same rulemaking procedures apply agency to agency. This means that changing the rulemaking process designed to help one group in one context will not only hurt the group's opponent, but it may also hurt that same group in another context. Complexities added to the rulemaking process to help opponents kill growth management rules would also be available to prevent the Department of Insurance from adopting rules to protect those same individuals from insurance scams.

There are other concerns. Constituent problems may not be as important to the people of Florida as they are to the constituent. Also, if ninety-nine percent of the process that is working is ignored while a remedy is fashioned to fix the one percent that is not working, the solution that results could cause problems for the entire system.

25. *Id.* at 438.

3. *Costs*

Reformers have shown little concern about the cost of reform. The cost of changing the APA, especially if it involves repealing the Act, is substantial. Years of experience under the old provisions may be rendered worthless. Bureaucrats may have to relearn basic rules governing how they must do their jobs. They may have to revise rules, rewrite forms, and change parts of their routine. Those who are affected by agency action may also have to retool. They may press their issues with less confidence at first as they learn to navigate through new provisions. They must expend resources to relearn the procedural system that could otherwise be directed to solving substantive problems. The courts also will have to learn the new provisions and gauge the effect of changes on the system as a whole. As with any new provision, there will be ambiguities and uncertainties for lawyers to litigate and for the courts to clarify. All this will take years and much constituent money to achieve.

4. *There Are Better Ways*

The last legislative session showed us how not to amend the APA. Some may disagree. Sally Bond Mann argues that "after two special legislative committees investigated allegations of agency abuse and assembled respected experts in administrative law to draft reform proposals, the fact that none of those proposals passed the legislature leads one to question whether meaningful revision of Ch. 120 can be accomplished."²⁶ Because I was mentioned as one of those experts,²⁷ I note my disagreement with this statement. First, I agree with the shortcomings of the Task Force approach noted by David Gluckman.²⁸ Second, I contest the suggestion that the experts drafted the proposed legislation. The House Select Committee and its staff controlled the drafting. I suspected from the outset that people like me were invited to join the Task Force to give its product credibility, rather than to shape the outcome. The way that my name, and the names of others in the field, are used in Sally Mann's article confirms my suspicions.

Third, from the outset, the Task Force had the wrong focus. It was not interested in determining whether problems existed, whether the Legislature should address those problems, or which method of legislative control should be employed. The House Select Committee skipped those steps of the analysis, as it engaged in the business of

26. Mann, *supra* note 14, at 60.

27. *Id.* at n.3.

28. Gluckman, *supra* note 4, at 350.

proposing significant changes to the APA. The only question put to the experts was what kind of legislative changes could be made to the APA. No proposed change was off-limits for discussion. A long and diverse list of proposed changes was generated.

After attending just one meeting of the Task Force, I had serious misgivings about the process. In a letter to the Staff Director shortly after that first meeting, I suggested:

While I think it was a very good idea for the Committee to seek input from people like me in connection with its work, the kind of wide ranging study of the APA that our efforts suggest may be underway may be better accomplished through another process. When Governor Askew sought to reexamine administrative procedure in the early 1970's he turned to the Law Revision Council. While I know that you and your staff have been working hard on these issues, I do not think that our Task Force can assist you and the Committee with the kind of input that a group like the Law Revision Council could provide. The kind of major changes to the APA that we are discussing, such as changing the rules on consideration of hearsay evidence, revising the law governing judicial review, changing rulemaking procedures again, offering simplified administrative proceedings and the like, will prompt reexamination of other provisions. It is hard to make changes like these without making a more careful study of the APA as a whole. I do not think we are presently well equipped for a task of that magnitude. A less careful study will create new problems that will make demands on the Legislature's time and attention in future years.²⁹

I chose not to participate further in the Task Force.

If the Legislature cannot be dissuaded from making significant changes to the APA, the Legislature should at least enlist significant technical assistance. The Legislature should either revitalize the Law Revision Council³⁰ and assign this matter to that group for study and recommendations, or should create an APA study commission of similar composition and assign it a similar task.³¹

C. *How to Get Involved*

If a procedural problem can be articulated that should be addressed by the Legislature, then thought should be given as to how the Legis-

29. Letter from Stephen T. Maher to Cliff Nilson, Staff Dir. of the Legislative Task Force on the APA (Aug. 10, 1993) (copy on file with author).

30. The Law Revision Council did good work in the 1960's and 1970's helping to modernize the statutory law of Florida. It was a nonpartisan group that studied acts needing comprehensive revision and developed proposed legislation. The present APA was developed in this fashion. Stephen T. Maher, *The Seventh Administrative Law Conference Chairman's Introduction to the Symposium Issue*, 18 FLA. ST. U. L. REV. 607 (1991).

31. The proposal that an APA study commission should be appointed was considered briefly in the Senate during the session. It was rejected because of budgetary considerations.

lature should address it. Amending the APA should be a last resort. Procedural changes can create difficulties if their consequences are not carefully evaluated and they can cost government, regulated persons and the public at large much more than legislators suspect.

I do not contend that the APA should never be amended. The 1991 amendments are a good example of changes that were necessary, that were carefully considered over more than one session, and that were consistent with the balance struck in the original APA.³² Some modest degree of amendment, when necessary, should occur. The failure of Congress to amend the general rulemaking provisions of the federal APA to keep pace with developments in the area left the federal system without a clear set of rulemaking procedures. Because of Congressional inaction, the federal APA has been treated more like a constitutional provision than a statute on this issue.³³ This treatment has allowed the federal courts to shape rulemaking procedure under the federal APA to a much greater degree than is possible in Florida. While that degree of legislative neglect is probably excessive, the prospect of yearly amendments to the APA, at the other extreme, is equally unappealing.

If amendment is a last resort, what options are available? There are many. The most overlooked response to perceived agency abuse is legislative oversight. This is different than oversight in the form of committees taking testimony about abuse to justify APA amendments, or Joint Administrative Procedure Committee (JAPC) review, or review in the Appropriations Committee. Instead, I suggest revitalizing oversight by substantive legislative committees. There has been a big change over the last twenty years in the way that the Florida Legislature performs its agency oversight responsibility. There has been a shift of both power and attention from the work of the substantive committees to the appropriations process. This is understandable from a political perspective, but it is unfortunate because the Legislature knows less about the actual operations of the agencies it funds than it would if it was more involved in more substantive oversight.

Legislative oversight is no panacea. There are limits to its effectiveness, and problems can arise with that process as well.³⁴ But in the area of administrative procedure, the record has been promising. The 1991 amendments to the Act came out of the oversight process.³⁵

32. See Maher, *supra* note 7, at 380.

33. Maher, *supra* note 3, at 833.

34. For a deeper look at the promise and problems of legislative oversight in Florida, see Dan R. Stengle & James P. Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 FLA. ST. U. L. REV. 415, 417-30 (1993).

35. *Id.* at 427.

Also, traditional legislative oversight will yield more accurate data than the select committees this past session were able to gather on where problems exist and how serious those problems are. Horror stories do not give a fair picture of the bureaucratic reality. Reading agency employees the "riot act" may produce some bowed heads and a sense of satisfaction, but it is unlikely to produce much positive change. Unfortunately, to promote real change, the Legislature must spend time slogging through the details, developing expertise, and putting aside drama in favor of practical intervention. That is not the stuff of sound bites. But in the end, it will prove much more constructive than passing radical amendments to the APA, or repealing it altogether for some yet to be articulated alternative.

Especially where the major goal is to achieve better legislative control of executive action, the use of tools such as legislative oversight by the substantive committees, discussions with recalcitrant agencies during the appropriations process, and JAPC review of agency rules can together play a role in reestablishing legislative control over the bureaucracy.

Even if the Legislature works to address the problems that exist without amending the APA, it still may reach a point where everyone agrees that there are a few issues that can and should be addressed by making changes to the APA. That is the point where a legislative agenda should begin to form.

IV. LEGISLATIVE PROPOSALS ADVANCED DURING THE SESSION

A. Legislative Suspension of Rules

Although legislative oversight has not captured the legislative imagination, proposals to legislatively suspend agency rules have. Legislative suspension, as it was described during the session, would allow the Legislature, perhaps acting through the Joint Administrative Procedures Committee (JAPC), to vote to suspend a rule that an agency refuses to withdraw at the JAPC's request. The suspended rule would then come before the whole Legislature for review in the following session. The specifics of the legislative suspension proposals made during the 1994 Regular Session varied greatly.

Legislative suspension of rules is a problematic topic because of the concern that all rule suspensions may be unconstitutional on separation of powers grounds.³⁶ The distinction between a legislative veto of

36. For a more detailed analysis of the constitutional and other issues raised by legislative suspension and veto, see Stengle & Rhea, *supra* note 34.

rules, that even legislators who endorse suspension seem to agree would require a constitutional amendment to establish, and a legislative suspension of rules, that is really the same thing as a veto, but over a more limited time period, may prove to be a distinction without a difference if the constitutionality of legislative suspension is challenged in the courts.

Not only is suspension constitutionally suspect, its value may be mostly symbolic. Even proponents of suspension agree that it would be rarely used because it presents practical problems that even advocates of this approach have not worked out. If rules are suspended, how can an agency deal with the absence of rules during the suspension? Can an agency adopt emergency rules, or substitute rules, to fill the gap created by the suspension? If those substitute rules were too similar to the suspended rule, they might be suspended also. Does this mean an agency must change policy during suspension? Could an agency continue to follow the policy the suspended rules embodied, but follow it as nonrule policy? If the agency did that, how could that non-rule policy be suspended? If the suspended rule was later approved or left intact after legislative review, what effect would that have on rights determined during the period of suspension, when the rule was not permitted to be used? Would retroactive reinstatement of the policy be fair under those circumstances? Yet how could treating people differently during and after the suspension be fair if it turns out nothing is really wrong with the rule?

Suspension ultimately failed because the Governor made it clear that he would accept no bill containing a legislative suspension of rules. Thus, even if a legislative veto-style proposal had passed, it would have had difficulty surviving a veto, and even if a veto were overridden, it would have had difficulty in the courts.

B. Repeal of the APA

The low point in the 1994 Regular Session came when the Senate Select Committee on Government Reform briefly considered the repeal of the APA, effective in 1996, with the details of its replacement to be announced. In a session of radical proposals, this was the most radical. It is hard even to begin to respond to this proposal. Perhaps the place to start is by outlining the three possible consequences of repeal. The first is readoption of the present Act. That would create great uncertainty in the process for a couple of years, but if the Act is readopted intact and in a timely fashion, no great long-term harm would result. That, unfortunately, would be unlikely. The second and third possibilities are more likely. The second is that no new act would be adopted. This could happen either because no replacement statute

would be ready for adoption before APA repeal became effective in 1996 or because of an impasse on what a new act should say. In that event, administrative disputes would pour into the courts. That would make the resolution of disputes with agencies much more complicated and expensive than is now the case. Such a morass would not favor the constituents of the legislators who favor repeal.

The third scenario is that a new act would be developed and adopted by 1996. Even if that would occur, it would take years for all those affected by the administrative process to learn the new system. The costs of such a transition should not be underestimated. Also, adoption of a new APA would likely place constituents like those who testified before the Legislature in an even worse position in the future than they are in now. Why is that likely? Because the present Florida APA provides an uncommon amount of protection for individual interests against agency abuse.

The likely model for an all new APA is the 1981 Model State Administrative Procedure Act (1981 MSAPA). It is a likely model because it is a uniform act and adoption of a model act can save some of the costs that are associated with the adoption of an all new statute. Much thought has been given to the model act and much commentary already exists. Where ambiguities or difficulties are found, there is case law from other states to help resolve them. Since many other states have used the procedural scheme outlined in the 1981 MSAPA, we know it can work.

The 1981 MSAPA is the only viable model act available. The old model act, 1961 Model State Administrative Procedure Act (1961 MSAPA), is an unlikely model for a new APA because the old Florida APA, the statute repealed in 1974 to make way for the present act, was based in part on the 1961 MSAPA. The present APA was adopted because of the many serious shortcomings of the old APA.

The downside of the 1981 MSAPA, from the perspective of the Legislature and its constituents, is that it provides much less protection for constituent interests from agency encroachment than the present Florida APA. Perhaps even more troubling for the Legislature, the 1981 MSAPA provides much less protection of legislative prerogatives from executive encroachment than the present Act, because it does not include remedies such as the rule challenge remedy.

No Governor is likely to oppose the idea of repeal of the APA. The executive branch would much prefer an act based on the 1981 MSAPA to the present Act. One theme of legislative proposals made by the executive branch in this area in recent years has been the repeal of the section of the act that authorizes proposed rule challenges. Repeal of the present APA would make it easier for the executive branch

to achieve that goal. The Governor would be unlikely to accept a new APA that is as strongly supportive of legislative power as the present one. One certain target would be the rule challenge process.

There is a continuing struggle among the executive, the legislative and the judicial branches for power within this and any other similar constitutional government. Any branch that fails to understand which changes will increase its power and which will diminish its power is likely to come out the loser. Repeal of the present APA would surrender legislative power to another branch of government. If a new act is proposed to take the place of the repealed act, it is most unlikely the new act will be as powerful as the present one in protecting legislative power from executive encroachment.

The Governor can refuse to sign any bill that he believes is too tough on the executive branch. If a new act is adopted that provides less protection against executive encroachment on legislative power, then the Legislature has lost power to the executive. If an impasse is reached in negotiations between the Legislature and the Governor, and no new APA emerges, the Legislature's power is still reduced. In that case, legislative power would flow to the courts, who will make up the rules governing judicial review of agency action in the absence of legislative direction.

The Legislature should not repeal the APA. A repeal would send the wrong message to agencies who in 1991 were dragged into grudging compliance with the rulemaking and indexing provisions of the Act. These new provisions have made it possible for us to know more about agency policy than we have known in the past. That knowledge is facilitating voluntary compliance, evenhanded enforcement, and a clear focus on where problems are and how they can be solved. Repeal, even repeal effective years hence, would do much to encourage agency noncompliance with APA requirements such as these on the grounds that, since APA requirements appear to be shortlived, procrastination could save the agency the time and effort of compliance.

C. *The Federalization of Florida Rulemaking*

The "federalization" of the Florida APA is the attempt to reshape the Florida APA in the image of the federal APA. These attempts are a concern because the Florida APA was not based upon the federal Act or even upon the model state act of the day.³⁷ Instead, the Florida

37. I have generally opposed all attempts to "federalize" our state's rulemaking system. Our administrative process is significantly different, and in some ways significantly better, than the federal system. See, e.g., Maher, *supra* note 3.

APA was an attempt to redefine administrative procedure in Florida to address Florida problems.³⁸ At the time it was adopted, the Florida APA was hailed as a new model of administrative procedure different in important and promising ways from previous procedural statutes.³⁹ It rejected old approaches and created innovative new procedures that were a significant improvement over administrative procedures used elsewhere and even procedures developed since the Act's creation.⁴⁰ This promise and history are ignored when the courts and the Legislature turn to federal law to interpret or refine the Florida act.

Federalization can happen in many ways. It can happen when legislators look to the federal rulemaking process for ideas when proposing additional requirements to the Florida rulemaking process. It can happen when Florida courts cite and analyze federal case law when deciding cases under the Florida APA. In one case, a Florida court has gone so far as to adopt federal case law contrary to the plain language of the Florida APA.⁴¹ For some reason, federal administrative law seems to have the strongest influence on Florida rulemaking.⁴²

Federal law governing rulemaking is significantly different from Florida law. Rulemaking requirements imposed by the Florida APA are uniform, flexible and responsive. If no one cares about a proposed rule, little process is required to adopt it. If those whose substantial interests are affected by a proposed rule want to oppose it, a lot of process is available to analyze and challenge the proposal before or after its adoption. This flexibility and responsiveness has served Florida well.

In contrast, the federal APA has suffered, since its adoption in 1946, from a serious lack of flexibility and responsiveness in its prescribed rulemaking procedures.⁴³ Rulemaking procedure under the federal APA is not as uniform as it is in Florida. First, an agency's organic act may contain special rulemaking requirements. Second,

38. "The Florida APA reflects a reform spirit and is a reaction to the abuses that made a wholesale revision of administrative procedure necessary in Florida." Stephen T. Maher, *Patricia Ann Dore and the Florida Administrative Procedure Act*, 19 FLA. ST. U. L. REV. 951, 953 (1992).

39. See, e.g., Donald W. Brodie & Hans Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 559-60 (the Florida APA is an example of a new generation of procedures and contains important innovations).

40. See generally Maher, *supra* note 3.

41. *Adam Smith Enters., Inc. v. Department of Env'tl. Regulation*, 553 So. 2d 1260 (Fla. 1st DCA 1989); Maher, *supra* note 3.

42. There are indications that "hard look" review is attractive to the courts. See *Adam Smith*. However, that is not something the Legislature is presently considering.

43. For a better annotated overview of federal rulemaking see Maher, *supra* note 3, at 830-32.

even if there are no special requirements, one of two general procedures, formal and informal rulemaking, can be applicable. Which procedure an agency follows depends upon whether or not Congress provided for rulemaking "on the record" in the agency's organic act.

In federal law, formal evidentiary proceedings were once more available during rulemaking, but in recent years formal rulemaking has become a rarity because of the narrow construction given to that remedy by the United States Supreme Court in *United States v. Florida East Coast Railway Co.*⁴⁴ This decision moved most rulemaking into the category of informal rulemaking. The problem this created was that, since the statute governing informal procedure provided only a basic framework for notice and comment proceedings, it did not provide much guidance for solving the practical problems that arose as that procedural system was implemented.

As the courts came upon problems that the statute did not address, their solution was to fill the void left by Congressional inaction by adding their own procedural requirements to, in effect, make informal rulemaking more formal. However, the addition of judicially created formalities for informal rulemaking was neither swift nor sure. This process took years, and there were missteps along the way. For example, during this period, some federal courts required what became known as "hybrid rulemaking."⁴⁵ Some formalities, such as cross-examination of key witnesses, were added to informal proceedings. While this compromise procedure was viewed as a good approach by the District of Columbia Circuit because it allowed adjudicative processes to be brought to bear at the crux of the matter without choking the proceedings with the additional formalities that characterized formal process, the United States Supreme Court disapproved of it.⁴⁶ However, the Court did approve of some other judicially created additions to the rulemaking process, such as the imposition of paper record requirements during rulemaking and hard look review during judicial review. The process in federal rulemaking today is a combination of a court imposed minuet of notices, responses and counterresponses in the *Federal Register*, and close review of rulemaking in the courts.

Florida has been spared this painful ad hoc development of its rule-making procedure because the Florida APA was so complete and well

44. 410 U.S. 224 (1973).

45. See RICHARD J. PIERCE, ET AL., *ADMINISTRATIVE LAW AND PROCESS* § 6.4.9 (1992) for a more thorough discussion of "hybrid" rulemaking.

46. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

drafted on this point from its inception. The procedure in Florida is much different and in some ways much better than the procedure that has emerged in federal law. Florida rulemaking is not paper minuet. When requested by affected parties, full evidentiary hearings are available both to inform the agency of the evidence and arguments it might have missed in drafting the proposed rule and to challenge the validity of the proposed rule. When the rule draws no interest, no pointless formalities are required. The rule is simply adopted. In the area of judicial review, the Florida APA does not require hard look review. Detailed parameters for judicial review are set out in the Act.⁴⁷

Given this history, why do people continue to look to federal law for guidance in this area? This is one of the great mysteries of Florida administrative procedure. Nevertheless, such efforts continue: During the 1994 Regular Session, a strong attempt was made to add paperwork requirements to Florida rulemaking similar to those found in federal law. Attempts to require agencies to respond in writing to comments made during rulemaking were proposed. Those were only the first steps in federalizing the APA by legislatively requiring a paper minuet like the one that now exists in federal law.

Paperwork requirements are no match for real evidentiary hearings. There does not seem to be much debate on this point. There was certainly no move to repeal any of the evidentiary hearing requirements that the Act now contains. Thus, if new paperwork requirements are passed, they would be in addition to present requirements, and would make the process even less efficient than it is now.

How inefficient these paperwork requirements will make the process depends on their particulars. If written explanations are required about many aspects of rulemaking, and are required for all rules whether or not anyone has challenged the rule or asked for the explanations, then the efficiency costs could be significant. The addition of complex paperwork requirements during rulemaking also risks unbalancing the process by allowing special interest groups greater influence over rulemaking than they now have, and by making it more difficult for agencies to do their jobs effectively. Before we make all rulemaking more burdensome and more time consuming, even in situations where no one objects to a proposed rule, we should recognize that our process can already be quite inefficient and we should determine whether the addition of paperwork is really necessary.

47. Unfortunately, the courts have largely ignored section 120.68 *Florida Statutes*, and have created their own review standards, standards that are too often vague, contradictory and confusing. See, Maher, *supra* note 3, at 811-28.

The reason that people have come to support the addition of burdensome paperwork requirements on agencies is clear. Some agencies have not always behaved as they should during rulemaking. A rulemaking hearing that consists of no more procedure than a sign-in sheet and a tape recorder run by a person who knows nothing about the proposed rule certainly appears less than meaningful, although it may not violate the technical requirements of the APA. It is frustrating to spend the time and money needed to prepare for and participate in a rulemaking hearing and to receive absolutely no feedback from the agency. Some agencies have demonstrated an aversion to input at rulemaking hearings. But this problem is not universal. There are agencies that listen and respond. Sometimes input at rulemaking hearings causes agencies to revise their rules. Existing APA provisions may be available to secure agency attention during rulemaking if they seem inattentive.⁴⁸

The Legislature can be involved in addressing these problems without burdening all agencies with new requirements. The Legislature can and should take agencies that give people the "silent treatment" during rulemaking to task during legislative oversight hearings. If that does not get the agency's attention, the Legislature can drive the point home during the appropriations process. The effectiveness of this kind of oversight should not be discounted.

The Legislature should recognize that adding paperwork requirements will put power over rulemaking beyond the reach of legislative oversight or appropriations. It will put power over rulemaking in the courts. The shift will occur in the following manner. The determination of whether a comment has received adequate response from an agency would be subject to more than one opinion. This ambiguity gives the courts flexibility to decide whether to hold agencies to paperwork requirements on the basis of unstated reasons. Judges are human, and they sometimes allow their feelings about the substance of

48. The filing of a rule challenge under section 120.54(4), *Florida Statutes*, together with a request for a rulemaking hearing under section 120.54(3), *Florida Statutes*, in circumstances where both are appropriate, can grab an agency's attention quite effectively. Section 120.54(4)(a), *Florida Statutes* provides:

Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.

Section 120.54(3)(a) provides in relevant part:

If the intended action concerns any rule other than one relating exclusively to organization, procedure, or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice, give affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform it of their contentions.

the agency action under review to affect their determination of the seriousness of a procedural flaw found in the record. Judges are, in most cases, not experts on the subject matter of agency disputes. A good argument can be made that, for this reason, judges should confine their judicial review to technical points. But the reality is that they are not so confined.

Thus, paperwork requirements in rulemaking, such as those proposed during 1994, will allow courts to strike down rules they do not like and uphold rules that they do like. The courts need not acknowledge the fact that they are motivated by their personal likes and dislikes. The rationales they give will be the presence or absence of "full" agency responses. One opinion will say a certain agency response to commentary is inadequate, another will say that a very similar response is adequate. Lawyers will puzzle over these inconsistent opinions, and will ultimately be left to argue some distinction between the two. One thing will be clear: paperwork requirements will give the courts greater power to decide which rules are adopted and which are not.

When the courts frustrate the adoption of rules favored by the Legislature, the Legislature will see in dramatic fashion how it has lost power through this change. The Legislature will then have even less power to influence the courts in informal ways than it now has to influence the executive branch. Legislative use of oversight or appropriations will not be able to influence the courts. To formally influence the courts, the Legislature must either get the Governor to sign new legislation or override his veto if he refuses.

The popularity of federalization in the Legislature is difficult to explain for another reason. In the federal system, power over rulemaking was not explicitly ceded to the courts by Congress. The courts stepped in to fill the vacuum after Congress failed to provide the needed guidance concerning rulemaking requirements. In Florida, there is no vacuum to fill. The APA defines rulemaking requirements with great clarity. Here, the Legislature is proposing that it simply give away its power.

This proposal is particularly surprising in light of recent Florida history. In *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*,⁴⁹ the First District Court of Appeal tried to adopt rulemaking requirements similar to those proposed in the Legislature in 1994. I strongly criticized this federalization of the rulemaking process in 1991.⁵⁰ The legislative reaction to *Adam Smith* was swift

49. 553 So. 2d 1260 (Fla. 1st DCA 1989).

50. Maher, *supra* note 3, at 811.

and sure. The 1992 amendments to the APA prevented these new requirements announced in *Adam Smith* from having any effect on rulemaking by abolishing direct appeal of rules to the District Courts of Appeal in almost all cases. This development had the effect of avoiding the federal style requirements that the court had decreed, but the result was achieved at great cost to the process. This legislative response was like an animal escaping from a trap by chewing off its leg. It is therefore quite surprising to see the Legislature seriously considering the adoption of requirements very similar to those that it narrowly escaped only two years ago.

D. Two Tiers for Rulemaking

Another proposal that gained support during the 1994 Regular Session was the suggestion that rulemaking procedure be changed to create two-tier stages of rulemaking in place of the present single-tier system. Under the proposed two-tier approach, in the first tier the agency would decide on a final proposed rule. During the second tier, the final proposed rule would be subject to challenge. If it survived challenge, it would be adopted.

What would be the result if this proposal were adopted? First, two-tiered rulemaking would increase the time needed to adopt all rules. Second, it would increase costs of adopting all rules, because extra money would be spent in providing published notices that most likely would go unread. Third, it would not provide significant benefits to justify these added delays and costs. This leads us to the fourth point. Why did the Florida business community, that traditionally rails against wasteful bureaucracy, endorse this proposal?

The proposal of tiered rulemaking will delay the adoption of all rules because it will split a one-step process into two steps. Each step requires published notice and requires that time be allowed between the publication of notice and the anticipated responses so that participation can occur. These changes will not only create delays, they will create delays in both contested and uncontested cases. A large number of rules are adopted without opposition. If all rules must go through this two step process, a circumstance which seems inescapable because objections cannot be known until the final proposal is published, then much wasted effort will result from this two-step system.

Delay is not the only problem. If adopted, these changes would also increase the costs of rulemaking while providing very little real benefit. They would require the publication of at least twice as many rulemaking notices, one for initial rulemaking and one for final rulemaking. This would be done even in the case of uncontested rules. This would not only cost taxpayers more, it will double the size of the

Florida Administrative Weekly, a development sure to be used as an example of bureaucracy out of control. Yet this would not be the result of bureaucratic action, it would be the result of a legislative package sponsored by the Florida Chamber of Commerce.

What justification can be advanced to support this proposal in light of the delay and expense it will create, especially given the fact that much of the delay and expense is pointless because it is connected with uncontested rules? Some are concerned that, where an agency changes a rule based upon comments received during rulemaking, the ability of other private interest groups in rulemaking to participate may be compromised. For example, an agency may propose a rule that Group A supports and Group B opposes. Group A does not file a challenge because it supports the proposal, but Group B both files a section 120.54(4) rule challenge and participates in the section 120.54(3) rulemaking hearing. In response to these proceedings, the agency then changes the proposed rule so it is favorable to Group B and opposed by Group A. If the agency decides not to republish the rule, and thus begin rulemaking all over again to give Group A the same chance to challenge the rule as Group B, Group A may argue that it has been deprived of its rights of full participation in the process. Without republication, the time will have passed for filing a section 120.54(4) challenges, and the agency can adopt its revised rule without opposition. Two-tier rulemaking would prevent this from happening, the argument goes, because everyone will know the final proposal, and the agency would not be permitted to change the proposal in response to challenges.

If this is the real reason for two tiers, the proposal is a solution out of proportion to the problem. The problem set out in the above example is not common. In the few situations it does occur, it can be handled within existing procedure. Sometimes "anticipatory rule challenges" are filed against rules that people favor to guard against the fact that the rules may be changed in an unfavorable way during the process. Also, the refusal to republish is only a limited protection against challenge. A proposed rule may avoid a section 120.54(4) challenge through a refusal to renote, but it may not avoid a section 120.56 rule challenge in that manner. A section 120.56 existing rule challenge is still available against any invalid rule that might emerge from the rulemaking process. In fact, an agency action like refusing to republish after significant change may provide the basis for a rule challenge even if no basis existed before that mistake was made.

If any legislative change is made to address this problem, it should be limited to adding a more explicit requirement of republication when an agency makes major changes to a proposed rule. This would

solve any problem that may exist without the great delay and cost incurred with the two tier proposal.

Some try to justify the two tier proposal on the ground that it will lessen the leverage of special interests during rulemaking. There is no question that the pendency of a proposed rule challenge provides the challengers with leverage during rulemaking. It is not uncommon to see such challenges dismissed when changes are made to the proposed rule. Some say that the two tier proposal will lessen that leverage by permitting proposed rule challenges only during that second rulemaking tier and by allowing no revisions to the final proposed rule during that second tier. The argument is made that this "locked in concrete" approach will prevent the challenge from giving the challenger any leverage in negotiating changes to the final proposed rule.

First, this argument is naive. The second-tier proposed rule may be locked in concrete, but the first-tier proposal is not. What prevents challengers from drafting their challenges and showing the agency the drafts of what they plan to file in the second tier in order to influence the substance of the final proposed rule? If the challengers have a good basis for blocking the proposed rule, but really only want a few changes made to the proposal, why should the agency refuse to make reasonable compromises to avoid a fight? Is it not irresponsible to refuse to make a reasonable compromise, to fight, to lose, and to then have no choice but to begin all over again?

What the two-tier proposal will really do is make it easier and less costly for special interests to have leverage over the rulemaking process. The two-tier proposal will encourage those who threaten to challenge the proposed rule in the second tier to walk around waving the unfiled challenge during the first tier. This will give potential challengers some of the leverage of a proposed rule challenge without the pressure of needing to actually get it filed within twenty-one days of the notice, and it will save the cost of actually being required to litigate the challenge once filed. Thus, the two-tier proposal is responsive to special interests who have complained that the proposed challenge is powerful but expensive, especially when agencies decide to fight rather than compromise. The two-tier approach preserves some of the potential leverage of the challenge, while lowering the cost because it can provide benefits even if the challenge is never actually filed.

The only reasonable justification for the business community's support of this proposal is that it would allow business interests to harness some of the power of a proposed rule challenge without the cost. This is very little benefit for the delay and cost this change will bring to the entire system, a cost that the business community and other taxpayers must shoulder. It seems hypocritical for business groups to

call for the abolition of bureaucratic cost and delay in the abstract while at the same time supporting proposals like this that use those very concepts to advance their interests at everyone else's expense.

E. Simplified Process at DOAH

Beginning the summer before the 1994 Regular Session, there was a sense that there was a need for simplified process in some Division of Administrative Hearings (DOAH) cases, including simple licensing cases where the licensee was pro se and was facing only minor disciplinary action. Suggested simplifications included dispensing with discovery and expediting the process.

From the beginning of this discussion, there was a concern that a simplified process, if used in the wrong types of cases, could lead to abuse. For example, if this kind of simplified process were used in a controversial matter where the real dispute was between the parties and a possible intervenor, could the parties to the proceedings agree to invoke the simplified process to permit no discovery and expedite the case to shut out potential intervenors, or to make it more difficult for intervenors to participate effectively?

Abstract concerns with the general proposal gave way to more serious concerns when the discussion turned to adding other features to the simplified process. The suggestion was made that this simplified process be an "opt-out," that is litigants at DOAH would find themselves in the simplified process unless they took some affirmative action to escape it.⁵¹ Also, the suggestion was made that discovery should be permitted in the simplified process, at the discretion of the DOAH hearing officer. In addition, the suggestion was made that DOAH hearing officers should have final order authority in these cases. Thus, if a procedure that follows these suggestions were adopted, a complex case could enter this process, still involve discovery be finally decided by DOAH. These additional suggestions change the face of simplified process to the degree that some people suspect that "simplified process" may be a vehicle to advance an entirely different agenda.

51. Mann, *Reforming the APA: Legislative Adventures in the Labyrinth*, 22 FLA. ST. U. L. REV. 307, 316 (1994). This suggestion gave way, in the final version of the legislation that did not pass, to a provision that would let any party seek simplified procedure and would give the DOAH hearing officer the power to decide whether simplified procedure would be employed. Seven "factors" were put in the proposal to serve as a guide for this determination. While Sally Bond Mann advances these factors as a check on DOAH authority, *Id.* at 314, n.35 the large number of factors which can be given varying weight, and the relative vagueness of the factors, can also be viewed as making DOAH decisions and making any decision to adopt a simplified process more difficult to reverse in an appellate court.

Why must simplified process be an opt-out, permit discovery, and place final order authority in DOAH? Are most DOAH cases appropriate for this type of resolution? The way the simplified process proposal was drafted, it could probably be applied in a large number of cases. The suggestion not to prohibit all discovery, and instead to allow discovery at the discretion of the DOAH hearing officer, removes the certainty of saving costs by electing the simplified procedure. Prohibiting all discovery in the simplified process would guarantee that people agreeing to the process would know from the outset what they were getting into.

Some suspect that the simplified process initiative is not just about simplicity, it is the first step in an attempt to wrest final order authority from agencies and place it in DOAH. The Act generally gives the agency, not DOAH, the authority to enter a final order when DOAH hears the case under a referral from the agency. The proposed simplified process could revolutionize this routine if it is widely used and allows agencies to be dragged into proceedings where they have no final order authority against their will. The argument can be made that, in small cases, agency discretion is not that important while efficiency is. Since it would save time and money for DOAH to simply enter final orders in such cases, the argument runs, it should be permitted to do so. But that tells only part of the story. The other part of the story, the part that was not fairly discussed when the bill was heard in committee, is that the simplified procedure created by this proposal could well affect cases that are neither simple nor small. What "simplification" may well do, if it is adopted in the form proposed, is strip administrative agencies of their final order authority in a wide variety of cases. Even without making a judgment about whether stripping agencies of final order authority is a good or a bad thing, it should be obvious that such a significant change in the procedural system created by the Act should at least be debated on its merits. The House Select Committee that voted this proposal out to the floor was not told that this proposal could have far reaching consequences on the shape of administrative adjudication under the Act. Such an important change should not be made by accident, or even accidentally on purpose, as the case may be here.

Some profess not to understand what all the fuss is about in placing final order authority in DOAH. Those individuals must not have been paying much attention to recent debates concerning the way the APA should be structured. Whether or not DOAH should have final order authority has not only been part of a continuing debate, it is a fundamental debate about the structure of administrative adjudication under the APA and the power of administrative agencies within that structure. Some favor giving final order authority to DOAH and some

do not, but there has never been any doubt where the Governor and others in the executive branch have stood on this issue. Where they stand is where they sit. They oppose giving DOAH final order authority because executive agencies have the most to lose if this change is adopted.⁵² The Legislature, thus far, has refused to move final order authority to DOAH in section 120.57 cases.

V. CONCLUSION

The failure to adopt amendments to the APA in 1994 was a good result. I hope we can think more carefully about whether change is needed, what change is needed and how change should be accomplished before the Legislature makes any new changes to the APA.

Others see the failure to amend the APA as a lost opportunity, and fault the executive branch for defeating change. For example, Sally Bond Mann blames the entrenched bureaucracy⁵³ and the Governor for protecting the executive branch, and charges that the Governor has not been true to his campaign promises to right-size and streamline government.

I have a different view. I believe that the executive branch, did too little to defend itself during the session and gave away too much too early in making its deal with the House that it almost caused passage of the proposed legislation. I am critical of the Governor and the agencies of this state for doing so little to preserve a process that they know is working and must continue to work well if agencies are to do their jobs effectively.

I hope that rather than attempting to place blame for what occurred, or what did not occur, people will begin to think in more constructive terms. In this Article, I have tried to suggest a framework for examining the need for change because I anticipate that changes to the APA will be proposed again in the 1995 Regular Session. Through tough questioning, clear thinking, and a respect for what has come

52. Sally Bond Mann argues that the Governor changed his position on this issue and refused to support giving DOAH final authority in the simplified procedure. The circumstances related were that the Governor's change in position came when legal counsel for a state agency, who had not participated earlier, objected to that aspect of the procedure. Mann, *supra* note 14 at 58. To the extent that this is intended to suggest that the Legislature was shocked to hear that the Governor and others in the executive branch were opposed to placing final authority in DOAH, it is difficult to accept. Executive branch opposition to placing any form of final order authority in DOAH is, and was, well known to all. Neither this well known executive opposition, nor the controversial nature of this proposal, were explained when the simplified procedure proposal came before the House Select Committee on Agency Rules and Administrative Procedures. In fact, from the presentation and discussion, it appeared that this proposal was not controversial.

53. See Mann, *supra* note 14, at 60.

before, we can right-size and streamline the 1995 APA legislative agenda. The people of Florida will benefit from this kind of effort.